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**New Mexico Occupational Health and Safety Bureau (OHSB) Directive 09-16**

**Subject:** Enhanced Enforcement Program (EEP)

**A. Purpose:** This notice establishes a New Mexico Occupational Health and Safety program to focus on agriculture, construction, and general industry employers whose actions provide a reason to believe they may be indifferent to their occupational safety and health obligations.

**B. Scope:** This notice applies to the State of New Mexico OHSB.

**C. References:** The following documents are referenced in or applicable to this instruction:

1. Occupational Health and Safety Act, NMSA 1978 50-9-1 to 50-9-25 (referred to as "the Act")
2. New Mexico Field Operations Manual
3. Environmental Improvement Act, NMSA 1978 Chapter 74
4. OSHA Instruction ADM 1-1.38, August 28, 2003, "The IMIS Enforcement Data Processing Manual for Use with the NCR", and subsequent changes.
5. OSHA Instruction CPL 02-00-145

**D. Cancellation:** This notice does not cancel any notice.

**E. Expiration:** There is no scheduled expiration for this directive.

**F. Action:** OHSB Compliance personnel will ensure that the procedures contained in this notice are followed when scheduling unprogrammed inspections.

**G. Background:** This directive describes procedures which are as effective as the instructions contained in the federal OHSA instruction CPL 02-00-145 titled Enhanced Enforcement Program. The abovementioned instruction is a revision to the program first announced in former Assistant Secretary John L. Henshaw's memorandum of March 12, 2004 entitled "Enhanced Enforcement Program for Employers Who Are Indifferent to Their Obligations Under the OSH Act".

The intent of this New Mexico OHSB directive is the same as that of CPL 02-00-145, which is to provide a systematic method for inspecting multiple workplaces of employers whose actions indicate a corporate policy of indifference to their safety or health obligations under the Act.

Because the federal instruction contains numerous references to processes and procedures that are different within OHSB, it was necessary to make substantial changes to Instruction CPL 02-00-145. This directive provides the New Mexico Occupational Health and Safety Bureau's alternative approach to CPL 02-00-145.

**H. Procedures:** The following procedures are to be followed by OHSB:

1. Compliance Officers are to become familiar with the material in Appendix A in order to be able to evaluate the employer during an inspection likely to result in an enhanced enforcement case.
2. The Compliance Manager will identify enhanced enforcement cases at the time the citations are issued, in accordance with criteria set forth in this directive.
3. The Compliance Manager will evaluate all EEP alert memorandums received from the OSHA National Office and schedule unprogrammed referral inspections of any worksites within New Mexico for the associated employer.
4. When the Compliance Manager determines that a New Mexico case meets the enhanced enforcement case criteria, the Compliance Manager will schedule unprogrammed referral inspections for any other workplaces within New Mexico for the associated employer.
5. When the Compliance Manager determines that a case meets the enhanced enforcement case criteria, the Compliance Manager will notify the Regional Administrator in writing.

**I. Criteria for an Enhanced Enforcement Case:** Any inspection that meets one or more of the following criteria at the time that the citations are issued will be considered an enhanced enforcement case. The serious violations can be of low, medium, or high gravity.

1. Fatality Criteria
  - a. A fatality inspection in which OHSB finds one or more willful or repeated serious violations related to a death; or
  - b. A fatality inspection in which OHSB finds one or more serious violations related to a death and the employer has either:
    - i. an OSHA history of violations similar in kind to the violation that led to the current fatality, consisting of at least one serious, willful, or repeat violation within the last three years; or

- ii. the occurrence of a previous fatality within the past three years regardless of whether any citation was issued.

## 2. Non-Fatality Criterion

An inspection that results in the citation of three or more serious violations that are also classified as willful or repeat (or any combination of such willfuls and repeats totaling three or more), and the employer has an OSHA history of violations similar in kind to one or more of the violations found in the current inspection consisting of at least one serious, willful, or repeat violation within the past three years.

## 3. Failure-to-abate Criterion

An inspection that results in one or more failure-to-abate notice where the underlying violation is classified as serious.

## 4. Additional Enforcement Inspections

Any egregious case will be considered an enhanced enforcement case.

## 5. Significant Cases

A significant case (significant enforcement action) consists of one or more inspection in which the proposed penalties total more than \$100,000. (In general industry, a significant case often consists of a safety and health inspection of the same employer; in construction, there may be several inspections of different companies comprising one significant enforcement action.)

For classification under the EEP, each individual inspection must be evaluated separately to determine if it meets one of the criteria in I.1., I.2., or I.3. If any of the inspections meets one of the enhanced enforcement criteria, it will be considered an enhanced enforcement case.

## 6. Grouped and Combined Violations

Grouped and combined violations will be counted as one violation for purposes of the enhanced enforcement case criteria.

## 7. Unclassified Violation

An unclassified violation will qualify for EEP designation, depending upon what the citation classification is, or would have been, if the unclassified designation had not been used.

## 8. OSHA History

- a. For purposes of this EEP, OSHA history is based on the employer's nationwide inspection history, which includes New Mexico OHSB as well as federal OSHA and other state plan state jurisdictions.

- b. Prior history must be based on a final order; it is important to know how the case was finally resolved (e.g., citations deleted/vacated), and not just what citations were issued.
- c. The following examples show a violation history that is “similar in kind” to the current violation for the purpose of this directive. This would also apply to any violations of the General Duty Clause.

Example 1. Violations of OSHA’s fall protection standards. A prior fall from a scaffold is considered similar in kind to a current fall through a floor opening or a fall from a roof.

Example 2. Violations of standards calling for personal protective equipment (PPE). A prior failure to provide hard hats is considered similar in kind to a current failure to ensure respirator use, or a failure to train regarding PPE.

Example 3. Violations of OSHA’s standards concerning exposure to toxic and hazardous substances. A prior exposure to lead is considered similar in kind to a current exposure to chemicals of a dipping/coating operation, or a failure to train on the hazards of the chemicals.

Note: For purposes of this directive, “similar in kind” is broader than the “substantial” similarity that is required for a repeat citation.

#### **J. Effects of the EEP program on Compliance Scheduling:**

When the Compliance Manager determines a case meets one of the enhanced enforcement case criteria, the case will be treated in accordance with paragraphs J.1. through 5. Only those EEP actions that are appropriate for the particular employer should be taken.

The actions described in paragraphs 2, 3, or 4 below may be taken before a case meeting the EEP criteria results in a final order of the Occupational Health and Safety Review Commission (“Review Commission”).

##### **1. Enhanced Follow-up Inspections**

- a. For any case opened on or after the effective date of this directive which is identified as an enhanced enforcement case, a follow-up inspection must be conducted even if verification of abatement of each cited violation has been received. The purpose of the follow-up inspection is to assess not only whether the cited violation was abated, but also whether the employer is committing similar violations. This is a modification of the follow-up procedures found in Chapter II, Paragraph E.1.b.(2) of the New Mexico FOM in that it has broader scope.
- b. If there is a compelling reason not to conduct a follow-up inspection, that reason must be documented in the file. The Bureau Chief and the Regional Administrator must be notified of this decision. Examples of compelling reasons not to conduct a follow-up inspection include: worksite closed; employer out of business; operation cited has been discontinued at the worksite; worksite moved out of New Mexico jurisdiction; case no longer

meets any of the EEP criteria because citation has been withdrawn/vacated; or cited EEP violations currently under contest.

- c. When OHSB has reason to believe a construction worksite is no longer active or is nearing completion, thus making a follow-up inspection impossible or impractical, at least one other worksite of the cited employer must be inspected to determine whether the employer is committing violations similar to those in the enhanced enforcement case.
- d. When a construction inspection is attempted but the employer is no longer at the site, the attempted inspection will not be coded with the N-8-EEP2 and the Regional Administrator will be notified.

Note: A “Corrected-During-Inspection” situation does not meet the requirement for a follow-up inspection.

## 2. Inspection of Related Worksites

OHSB views an enhanced enforcement case as an indication the employer may be indifferent to its obligations under the Act. Therefore, when circumstances warrant, OHSB will inspect related worksites of the same employer to determine whether the compliance problems initially cited are indicative of a company-wide problem.

Establishments are related when there is common ownership. Related establishments include establishments of corporations that are in the same corporate family, such as a parent corporation and all subsidiary corporations in which the parent has an ownership share greater than 50%.

### a. Comprehensive Inspection of EEPs on Establishment List

Establishments that have been identified as enhanced enforcement cases, which are on the current year’s OSHA Establishment List, may be placed in the current inspection cycle by the Compliance Manager. This action will prompt a comprehensive inspection.

### b. Comprehensive Inspections of Related EEP Sites on Establishment List

- i. When an inspection results in an enhanced enforcement case, all related establishments of the same employer in New Mexico will be moved to the current cycle if the establishment is in the same 3-digit NAICS code as the initial enhanced enforcement establishment.
- ii. Related establishments that are not in the same 3-digit NAICS code may also be placed in the current inspection cycle if the nature of the hazards and violations found might be present at the related sites.
- iii. If more than 10 related worksites of one company are identified, OHSB will randomly select no more than 10 to be moved to the current cycle.

- iv. An establishment that has been moved to the current inspection cycle will not be considered as having received an EEP action until it is inspected.

c. Limited Scope Inspections for EEP Sites not on Establishment List

Whenever an enhanced enforcement case occurs, other related sites of the same employer may be inspected if the Compliance Manager determines there are reasonable grounds to believe problems similar to those found in the enhanced enforcement case may exist at the other sites. Appendix B of this directive provides guidance on determining whether compliance problems found during the initial EEP inspection are localized or are likely to exist at related worksites.

- i. The Compliance Manager is responsible for determining if there is sufficient evidence of a company-wide problem to justify inspection of additional company worksites.
- ii. If the Compliance Manager determines that additional worksites should be inspected, at least one additional establishment of the cited employer within New Mexico will be inspected to determine whether that site has violations similar to those in the enhanced enforcement case.
- iii. If the Compliance Manager believes there are additional establishments in another State that should be inspected, all relevant facts will be sent to the Regional Administrator.
- iv. The scope of the inspection of a related establishment will depend upon the information obtained in connection with the original EEP inspection, and will mainly focus on hazards that are the same as, or similar to, those found in the original case.
- v. Inspections under this program will be given priority over any other programmed inspection.

3. Increased Company Awareness of OHSB Enforcement

For all establishments that are the subject of an enhanced enforcement case, the Bureau Chief must mail an information copy of the Citation and Notification of Penalty to the employer's national headquarters if the employer has more than one fixed establishment. In cases where OHSB determines that the establishment's safety and health problems need to be addressed at the company headquarters, the following actions may also be taken:

- a. A meeting may be held between OHSB and company officials to discuss how the company intends to address safety and health requirements. If the company operates outside of New Mexico, this normally will require National Office coordination.

- b. A letter may be sent from the Regional Administrator, or the appropriate National Office official, to the company president expressing OSHA's concern with the company's violations.
- c. Employee representatives (e.g., unions) should be notified when OHSB determines the establishment's safety and health problems need to be addressed at the company headquarters level.

#### 4. Enhanced Settlement Provisions

In coordination with the Office of General Counsel ("OGC"), OHSB will make use of settlement provisions to promote future compliance. For enhanced enforcement case establishments that are seeking a settlement, OHSB shall include some or all of the following provisions in any proposed settlement agreement:

- a. Requiring the employer to hire a qualified safety and health consultant to develop and, with the support of company management, implement, an effective and comprehensive safety and health program in the establishment.
- b. Applying the agreement company-wide.
- c. Requiring the employer to provide a list of its current jobsites and future jobsites within a specified time period.
- d. Requiring the employer to submit to OHSB its Log of Work-related Injuries and Illnesses on a quarterly basis, and to consent to inspections by OHSB based upon the report.
- e. Requiring the employer to notify the Compliance Manager of a serious work-related injury or illness experienced by an employee that requires medical attention, and to consent to an inspection based upon such notification.
- f. Obtaining employer consent to entry of a court compliance order under Section 74-1-10 of the Environmental Improvement Act, NMSA 1978.

#### 5. State Court Enforcement under Section 74-1-10 of the Environmental Improvement Act, NMSA 1978.

- a. Section 74-1-10 of the Environmental Improvement Act authorizes OHSB to commence a civil action in district court to enforce final Review Commission orders. The description of the legal actions available to OHSB is described in Section 74-1-10.
- b. Section 74-1-10 orders can be an effective and speedier alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowed time. They can be requested from the district court whether the final order results from a Review Commission decision, a settlement agreement, or an uncontested citation.

- c. All final orders issued in enhanced enforcement cases must be considered for Section 74-1-10 enforcement. In addition, a petition for Section 74-1-10 enforcement shall be considered in cases where final orders do not meet the enhanced enforcement case criteria, but where the following factors are present:
  - i. The employer's citation history or other indicators, such as widespread violations of the same or similar standards at multiple worksites, suggest serious compliance problems.
  - ii. The employer's statements or actions indicate a reluctance or refusal to abate significant hazards.
  - iii. The employer's behavior demonstrates an indifference to employee safety.
  - iv. The employer's repeated violations of the Act (particularly of the same standard) continue undeterred by the traditional remedies of civil monetary penalties and Review Commission orders to abate.
  - v. The employer repeatedly refuses to pay penalties.
  - vi. The employer files false or inadequate abatement verification reports.
  - vii. The employer disregards a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.
- c. Whenever possible, OHSB should attempt to identify cases that may warrant Section 74-1-10 enforcement at least a month before issuing the citation. When such a case is identified, the Compliance Manager shall contact the OGC to discuss citation language that is in accord with Section 74-1-10 enforcement. If a case identified for potential Section 74-1-10 action is being resolved through a settlement agreement, language should be sought in the agreement that commits the employer to specific ongoing abatement duties. Requirements that the employer hire a consultant to develop and implement a safety program and/or provide OHSB with a list of all the employer's worksites should be considered for inclusion in the settle agreement.
- d. OHSB shall conduct follow-up inspections with advice from the OGC on the type of evidence required to support a contempt petition in the event of the employer's noncompliance with the order of the court.

**K. Coordination:** The Regional Administrator will be the point of contact for all initial national coordination of the EEP. The Regional Administrator will notify the National Office of all EEP activity that requires action at the national level.

**L. Lining out Establishments from the EEP2 Log:**

Federal OSHA maintains a log, called EEP2 Log, in which inspections that meet the EEP criteria are recorded as they are reported by Regional Administrators. Whenever an employer enters into a settlement agreement that deletes a violation upon which an EEP designation is based, or if other legal action results



in the vacation of such violation, the EEP2 Log must be updated. The Compliance Manager shall notify the Regional Administrator of such occurrences for the purpose of having the EEP2 Log updated.

#### **M. Relationship to Other Programs:**

##### **1. Unprogrammed Inspections**

If the occasion for an unprogrammed inspection arises with respect to an establishment that is to receive an EEP-related inspection, the two inspections may be conducted separately or concurrently. This directive does not affect in any way OHSB's ability to conduct unprogrammed inspections.

##### **2. Programmed Inspections**

Some establishments selected for inspection under this directive may also fall under other OHSB initiatives, such as a Local Emphasis Program. Inspections under such programs may be conducted separately or concurrently with inspections under this directive.

#### **N. Recording and Tracking of Inspections:**

This section applies to all enhanced enforcement case opened on or after January 1, 2008.

1. Once a case is identified as an enhanced enforcement case, any OHSB Compliance Officer who inspected an establishment covered by the EEP shall modify the OSHA-1 by entering the code "EEP2" in Item 42, Optional Information, for the inspection.

Example: N 08 EEP2

2. If the case is resolved by way of a settlement agreement, modify the existing record to add the enhanced enforcement settlement agreement code "ENHSA".

Example: N 08 EEP2, ENSHA

3. If the case is also determined to be a significant case, modify the existing record to add the significant case code "SIGCASE".

Example: N 08 EEP2, SIGCASE

4. If the inspection is a Non-Primary Inspection in a Multiple Inspection Significant Case, the (S + Activity Number of Primary Inspection) code shall be used.

Example: N 08 EEP2, S#####

5. If the case also receives an enhanced settlement agreement, modify the existing record to add the enhanced enforcement settlement agreement code, "ENHSA."

Examples: N 08 EEP2, SIGCASE, ENHSA  
N 08 EEP2, S#####, ENHSA

6. In addition, all enhanced enforcement follow-up inspections, related general industry inspections, and related construction inspections shall be coded “EEP2”, regardless of whether violations are found.

**O. Dun & Bradstreet Number:**

For companies that have a Data Universal Numbering System (“DUNS”) number, the number shall be entered in the appropriate field on the Establishment Detail Screen. For establishments where ownership has changed, enter the DUNS number for the new owner. If the new owner does not have a new DUNS number, enter the old DUNS number. The field on the Establishment Detail Screen can be accessed by pressing F5 in Item 8 to access the establishment processing. Once the processing is completed, the DUNS number will appear in Item 9.b.

**P. End of the Fiscal Year Report:**

The Bureau Chief’s designee shall compile an End of the Year report of OHSB’s EEP activity covering the period from October 1<sup>st</sup> through September 30<sup>th</sup> for submission to the Regional Administrator. The report shall include the following information:

1. Number of EEP cases.
2. Number of follow-up inspections conducted at EEP worksites.
3. Number of EEP-related establishments from Establishment Lists inspected.
4. Number of additional establishments of the same employer inspected.
5. Number of notifications sent to company headquarters.
6. Number of signed Settlement agreements with enhanced provisions.
7. Number of state court actions initiated by sending documentation to OGC.
8. Number of state court actions approved.
9. Number of state court actions filed with a court.
10. Number of verification inspections conducted for purposes of determining compliance with a state court order.
11. Number of cases found where the employer was not in compliance with the state court order.
12. Number of cases referred to the New Mexico Court of Appeals for enforcement action, along with their current status or outcome.
13. Information concerning any EEP –Alert memoranda issued.
14. Number of EEP referrals received from Federal OSHA.
15. Suggestions and recommendations from OHSB.

By and Under the Authority of

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Chief, Occupational Health and Safety Bureau

## **Appendix A**

### **Information Required on Each EEP Inspection for Report to the OSHA Regional Office**

Employer Name	Inspection Number	Regional Office	State Office
Opening Date	SIC and NAICS Code	# of Employees	# of Employees Controlled

1. Indicate if the inspection is an EEP, a Follow-up (FU), a Construction-Related (C-R), or a General Industry-Related (GI-R). If the inspection is conducted based on an EEP Alert Memo, the inspection will be either C-R or GI-R.
2. If the inspection is other than an EEP, include the name and inspection number of the EEP case to which it is a follow-up or related.
3. Indicate whether the inspection is construction or non-construction.
4. Indicate which EEP2 criteria apply:
  - a. Fatality – One or more Willful or Repeat violations related to death.
  - b. Fatality – One or more Serious violations related to death and employer history is similar in kind.
  - c. No-fatality – Three or more Serious violations also classified as Willful or Repeat and employer history is similar in kind.
  - d. Failure-to-abate – One or more based on a Serious citation.
  - e. Egregious Case
5. If history is an element, give inspection number that history is based upon.
6. Indicate which EEP actions have been taken:
  - a. Follow-up inspection conducted, or compelling reason not to conduct.
  - b. Establishment inspection that was moved from establishment list to current cycle.
  - c. Additional agriculture worksite inspected.
  - d. Additional construction worksite inspected.
  - e. Additional general industry worksite inspected.
  - f. Citation sent to company headquarters.
  - g. Letter sent to company headquarters by Federal OSHA Regional or National Office.
  - h. Meeting with company officials.
  - i. Enhanced settlement provisions used.
  - j. State court enforcement actions taken under Section 74-1-10.

## **Appendix B**

### **Compliance Officer Guidance: Considerations in Determining Company Structure and Safety and Health Organization**

When determining whether to inspect other worksites of a company that has been designated an enhanced enforcement case, it must first be determined if compliance problems and issues found during the initial EEP inspection are localized or are likely to exist at other, similar worksites owned and operated by that employer. If the problem at the local workplace appears to be symptomatic of a broader company neglect of employee safety and health, the company structure must be investigated so there will be a basis for finding other worksites.

#### **Extent of Compliance Problem**

To determine if violative conditions are a result of a company decision or interpretation concerning a standard or hazardous condition, ask the following types of questions of the plant manager, safety and health personnel, and line employees:

Who made the decision concerning the violative operation, local management or company headquarters?

Is there a written company-wide safety program? If so, does it address this issue? If so, how is the issue addressed?

Is there a company-wide safety department? If so, who are they and where are they? How does company headquarters communicate with worksites? Are establishment/worksites safety and health personnel trained by the company?

Do personnel from company headquarters visit worksites? Are visits on a regular or irregular basis? What subjects are covered during visits? Are there audits of safety and health conditions? Were the types of violative conditions being cited discussed during company visits?

Does the company have worksites other than the one being inspected that do similar work or produce like products? If so, where are they?

What is the overall company attitude concerning safety and health? Does the establishment or worksite receive good support from company headquarters on safety and health matters?

Is the establishment's/worksites' overall condition better or worse than past years? If worse, why? Has new management or ownership stressed production over safety and health? Is the equipment outdated or in very poor condition?

Is there an active and funded maintenance department? Have they identified these problems and tried to fix them?

Have they worked at or visited other similar worksites owned by the company? How was the issue being treated there?

## **Identifying Company Structure**

To determine where other worksites are located and how they are related, ask the following types of questions:

Is this worksite owned by another legal entity (parent company)? If so, what is the name and location?

Is this worksite a division or subsidiary of the parent company?

Are there other divisions or subsidiaries of this company or of the parent company?

Are there related worksites that do the same type of work or have the same type of safety or health concerns?

Are the company entities publicly or privately held?

What are the names, positions, and addresses of relevant company personnel?

For whom do the company safety and health personnel work?